Hap Seng Credit Sdn Bhd v Rentak Arena (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24FC-59–01 OF 2016
ABU BAKAR JAIS J
3 JANUARY 2017

Land Law — Order for sale — Cause to contrary — Defendant failed to pay loan given by plaintiff — Plaintiff filed originating summons to request order for sale of defendant's land pursuant to s 256(3) of the National Land Code — Whether there was cause to contrary in granting order for sale — Whether order for sale action in rem or action in personam — Whether statutory provisions of the Moneylenders Act 1951 had been complied by plaintiff — Moneylenders Act 1951 — National Land Code s 256(3)

The plaintiff had filed originating summons ('OS') to request order for sale ('the said order') pursuant to s 256(3) of the National Land Code to foreclose the defendant's land as the latter had failed to pay the loan given to it by the former. The core issue for consideration was whether there was cause to the contrary in granting the said order. The defendant also had raised several other issues for court's determination which were: (a) whether the plaintiff did not comply with s 10O(1) of the Moneylenders Act 1951 ('the Act'); (b) whether the plaintiff was licensed to provide secured loan; (c) whether there was a breach of s 17A of the Act; (d) whether there was a breach of s 17 of the Act; (e) whether the plaintiff had infringed r 10(1) of the Moneylenders (Control & Licensing) Regulations 2003; (f) whether the plaintiff breached s 27(1), (2) and (3) of the Act; (g) whether the plaintiff's demand to foreclose was defective; (h) whether the plaintiff breached s 18 of the Act; (i) whether the plaintiff breached s 23 of the Act; (j) whether s 66 of the Contracts Act 1950 ('the CA') operated in favour of the defendant; and (k) whether s 71 of the CA operated in favour of the defendant.

Held, allowing the plaintiff's OS with costs:

(1) Most of the issues raised by the defendant were irrelevant because the order for sale was an action in rem and not an action in personam. The issues in respect of the moneylending transaction between the plaintiff and the defendant were at best only an action in personam. It did not relate to the plaintiff's right in rem in foreclosing the property itself. Further, the defendant had not satisfied any of the three conditions as laid down in the case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 as what was alleged by the defendant was similarly the breaches in respect of the provisions of the Act as against the loan agreement.

Nevertheless, the alleged non-compliance by the plaintiff with respect to the provisions of the Act had not been proven by the defendant (see paras 10, 14 & 61).

[Bahasa Malaysia summary

Plaintif telah memfailkan saman pemula ('SP') untuk memohon perintah jualan ('perintah tersebut') berikutan s 256(3) Kanun Tanah Negara untuk merampas tanah defendan kerana defendan telah gagal untuk membayar pinjaman yang diberikan kepadanya oleh plaintif. Isu utama untuk pertimbangan adalah sama ada terdapat kausa bertentangan dalam memberikan perintah tersebut. Defendan juga membangkitkan beberapa isu lain untuk penentuan mahkamah yang mana adalah: (a) sama ada plaintif tidak mematuhi s 10O(1) Akta Pemberi Pinjam Wang 1951 ('Akta'); (b) sama ada plaintif mempunyai lesen bagi memperuntukkan pinjaman berjamin; (c) sama ada terdapat pelanggaran s 17A Akta; (d) sama ada terdapat pelanggaran s 17 Akta; (e) sama ada plaintif telah melanggar peraturan 10(1) Peraturan-Peraturan Pemberi Pinjam Wang (Kawalan dan Pelesenan) 2003; (f) sama ada plaintif melanggar s 27(1), (2) dan (3) Akta; (g) sama ada tuntutan plaintif untuk merampas harta adalah cacat; (h) sama ada plaintif melanggar s 18 Akta; (i) sama ada plaintif melanggar s 23 Akta; (j) sama ada s 66 Akta Kontrak 1950 ('AK') digunapakai memihak defendan; dan (k) sama ada s 71 AK digunapakai memihak defendan.

Diputuskan, membenarkan SP plaintif dengan kos:

(1) Kebanyakan isu yang dibangkitkan oleh defendan adalah tidak relevan kerana perintah jualan adalah tindakan in rem dan bukan tindakan in personam. Isu-isu berkaitan transaksi pinjaman wang di antara plaintif dan defendan hanya tindakan in personam. Ia tidak bersangkut kepada hak in rem plaintif dalam merampas haratnah tersebut. Selanjutnya, defendan tidak memenuhi mana-mana tiga syarat seperti yang ditetapkan di dalam kes *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 apa yang didakwa oleh defendan adalah seperti pelanggaran berkaitan peruntukan Akta terhadap perjanjian pinjaman. Walau bagaimanapun, dakwaan ketidakpatuhan oleh plaintif berkaitan peruntukan Akta tidak dibuktikan oleh defendan (lihat perenggan 10, 14 & 61).]

Notes

For a case on cause to contrary, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) para 4345.

Cases referred to

Jigarlal K Doshi @ Jigarla a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal [2013] 3 MLJ 61, CA (refd)

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77, SC (refd)
Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing [2006] 5 MLJ 589; [2006] 6 CLJ 205, HC (refd)
Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd [1989] 3 MLJ 246, HC (refd)

Legislation referred to

Contracts Act 1950 ss 66, 71
Moneylenders (Control and Licensing) Regulations 2003 reg 11, Schedule J, Schedule K
Moneylenders Act 1951 ss 10O(1), 17, 17(1), 17A, 18, 18(1)(b), 19, 21, 23, 27(1), (2), (3), 29H(1), (2)(h), First Schedule A
National Land Code ss 256(3), 340, Form 16D

Koay Weng Man (Chee Siah Le Kee & Partners) for the plaintiff.
Yusrin Faidz bin Yusoff (Faidz Leong & Chong) for the defendant.

Abu Bakar Jais J:

INTRODUCTION

[1] This is case where the plaintiff had filed the originating summons ('OS') for it to request the order for sale pursuant to s 256(3) of the National Land Code ('the NLC') from this court to foreclose the land of the defendant as the latter had failed to pay the loan given to it by the former. Arising from this application are the issues whether there is cause to the contrary in granting that order requested and whether the various statutory provisions of the Moneylenders Act 1951 ('the Act') have been complied by the plaintiff in requesting the same.

BACKGROUND FACTS

[2] The plaintiff's application for order for sale is pursuant to the legal charge created by the defendant in favour of the plaintiff over the property held under Pegangan Hakmilik Geran 72609, Lot 65922, Mukim Batu, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan ('the property') which had been duly registered on 20 March 2015 vide presentation No 8159/2015 ('the charge').

[3] The plaintiff is a licensed moneylender under the Act at the material time when the term loan facility was given to the defendant. The defendant is the registered owner of the property.

[4] At the defendant's application, the plaintiff had granted a term loan of RM1,608,900 ('the loan') to the defendant subject to the terms and conditions stipulated in the letter of offer dated 25 June 2014 ('the letter of offer'). The

defendant had duly accepted the terms and conditions by signing the letter of offer. The plaintiff and the defendant also entered into a loan agreement dated 19 May 2014 ('the loan agreement'). A

[5] The format and he terms of the loan agreement have been duly approved by the Registrar of Moneylenders in 2004 as evidence in the letter of approval dated 5 July 2004. B

[6] The charge provided, inter alia, that:

(a) the defendant will pay to the plaintiff the total amount outstanding upon demand; C

(b) the defendant will indemnify the plaintiff against any losses or costs including legal fees on a solicitor and client basis and full indemnity upon the defendant's default to pay any sums due and payable under the charge including the interest; D

(c) if the loan or indebtedness or any part thereof shall be required to be recovered through any process of law, the defendant shall pay the legal fees on a solicitor and client and full indemnity basis and any other fees and expenses incurred in respect of such collection; and E

(d) a certificate signed by a duly authorised officer of the plaintiff certifying the total amount due and payable by the defendant shall be conclusive for the purpose of legal proceedings and shall be binding upon the defendant. F

[7] The loan had been disbursed to the defendant for the defendant's benefit or usage on 11 November 2014 vide a cheque dated 10 November 2014.

[8] However, the defendant had failed, refused and/or neglected to pay the outstanding sum in respect of the loan. G

THIS COURT'S FINDINGS

General observation H

[9] It is important to say at the outset, respectfully the contentions of the defendant mostly are not relevant to answer the question whether the order for sale should be granted. After taking the loan of more than a million ringgit, the defendant created all sort of issues pertaining to the moneylending transaction in respect of the loan. As will be shown in a short while, the core issue to be decided is whether there is 'cause to the contrary' to deny the order for sale requested by the plaintiff. However as will be explained further, the defendant I

with respect raised issues largely challenging the loan agreement and as decided by the case law which are highlighted later, these issues cannot deny the order for sale of the property.

Action in rem not personam

[10] This court say most of these issues (all these issues will be discussed in a short while) raised by the defendant are irrelevant because the order for sale is an action in rem. It is not an action in personam. It is against the land or property itself and more so when the charge has been duly registered. It is a based on statutory provision ie s 256(3) of the NLC for order of sale. The issues raised in respect of the moneylending transaction between the plaintiff and the defendant is however at best only an action in personam. It does not relate to the plaintiff's right in rem in foreclosing the property itself.

[11] It is also to be noted that it is a daunting task for the defendant to object to the plaintiff's present OS. This is because an objection against the order for sale to be given in respect of foreclosure of a property on the ground of cause to the contrary under s 256(3) of the NLC can only happen under three categories of cases as laid down by the Supreme Court's case of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. The three categories are as follows:

(a) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the Code;

(b) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

(c) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

[12] More importantly the facts of this case are similar with the present case before this court where the relevant passage states:

> As earlier observed, unless a chargor can bring himself within one of the three categories of cases set out earlier in this judgment, no cause to the contrary would be shown and the court will be obliged to make an order for sale. *It would not be sufficient, as was done in the instant case, to allege mere breaches by the chargee of the loan agreement between the chargee and the borrower or even of the terms of the annexure to the charge in order to resist an application under s 256(3) of the Code. An allegation that the chargee acted in breach of contract, while it may give rise to an independent action in personam, is insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale.*
>
> We are conscious that the approach we have adopted results in a very narrow and restrictive interpretation of s 256(3) of the Code. But there are good reasons of policy for such an interpretation. It must not be forgotten that in the ordinary way,

> banks and other financial institutions loan moneys deposited with them by their customers to a borrower on the faith of the security of a charge created over the landed property of the borrower, or as here, of a third party. In the event of a default by the borrower, the lending institution normally looks to early recovery of all or a substantial part of the money due to them from a sale of the security. If the courts of this country interpret the phrase 'cause to the contrary' appearing in s 256(3) of the Code liberally, then, institutional lenders would lose confidence in their right to realise their security through an order for sale. Financial institutions would then become reluctant to lend money to bona fide entrepreneurs. Commerce would come to a standstill and the development of land and industries in this country which are largely dependent upon loans from banks would cease. No judgment of this court will be designed to produce such a consequence. (Emphasis added.)

[13] In *Jigarlal K Doshi @ Jigarla a/l Kantilal Doshi v Resolution Alliance Sdn Bhd and another appeal* [2013] 3 MLJ 61, the Court of Appeal stated at p 68 that:

> In a foreclosure action, claims of, inter alia, alleged breaches of contractual obligations or challenges on the calculation of interest under the loan agreement are not relevant. The court will only be concerned with the restrictive categories of 'cause to the contrary' as laid down in the case of *Low Lee Lian*. The alleged breaches and challenges are matters to be raised by the appellant in a separate civil suit.

[14] This court is of the finding that the defendant in the present case has not satisfied any of the three conditions above as laid down in *Low Lee Lian* as what is alleged by the defendant is similarly the breaches in respect of the provisions of the Act as against the loan agreement. Much more of this will be discussed below.

The defendant's contentions

[15] As stated this court will nevertheless address all the issues raised by the defendant in opposing the plaintiff's OS so as not to be baselessly accused of not considering every contention of the former in arriving at the decision in this case.

Whether the plaintiff did not comply with s 10O(1) of the Act.

[16] The above provision states:

> A copy of a licence, certified by the Registrar to be a true copy of such licence, shall be admissible as evidence for all purposes for which the original of such copy would have been admissible had such original been produced and admitted as evidence, without proof of the signature or authority of the person signing the licence or the copy of the licence.

[17] Essentially the defendant submitted a photocopy of the plaintiff's

licence to show evidence that the plaintiff is authorised to be engaged in money lending transaction is not sufficient. It must be certified by the Registrar of Moneylenders.

[18] However this court is of the finding this provision is not relevant when we consider Item No 15 of the explanatory statement of the Moneylenders (Amendment) Act 2003 which provides that:

> Clause 18 also seeks to introduce a new Part IV into Act 400 that contains provisions regarding the admissibility of evidence. The amendments proposed at this Part introduce new sections into the Act, namely sections 10L, 10M, 10N and 10O. The proposed amendments, inter alia, deal with the evidence of an agent provocateur in any proceedings for an offence under the Act, the admissibility of statements made by an accused person, and the protection of informers and information received from such informers.

[19] As noted the provision cited by the defendant above exist to deal actually with the evidence of agent provocateur in any proceedings for an offence under this Act and therefore does not apply here where the plaintiff is the provider of the loan and the defendant is the receiver of the same.

Whether the plaintiff is licensed to provide secured loans

[20] The defendant contended the plaintiff's licence did not specify that the latter can provide secured loan by way of a charge. What is allowed according to the defendant is only for the plaintiff to give unsecured loans.

[21] With respect to this submission of the defendant, first the letter of approval dated 5 July 2004 from the Registrar of Moneylenders stated that the plaintiff can use the format of the amended loan agreement for any secured loan more than RM50,000. It is therefore incorrect for the defendant to suggest that the plaintiff can only provide for unsecured loan and not secured loan.

[22] Besides there is evidence adduced by the plaintiff that the plaintiff had obtained the approval from the Registrar of Moneylenders to modify and vary the terms of the prescribed agreement in Schedule K vide letter dated 5 July 2004 from the Ministry of Housing and Local Government. The Registrar of Moneylenders had granted approval to the plaintiff to use the agreement as per the format shown in pp 12–114 of the plaintiff's supplemental affidavit (2) for any loan transaction exceeding RM50,000.

[23] In this regard, s 29H(1) and 29H(2)(h) of the Act provides that:

(1) The Minister may make such regulations as may be expedient or necessary for the purpose of giving full effect to the provisions of this Act or for carrying out or achieving the objects and purposes of this Act.

(2) Without prejudice to the generality of subsection (1), the Minister may make regulations for or in respect of all or any of the following matters:

(h) the *form of moneylending agreements*to be used by a licensee and a borrower *and other matters relating to such agreements*. (Emphasis added.)

[24] Based on the aforesaid provisions, the Minister is empowered to make regulations as necessary in relation to the loan agreement. The power to amend or vary the loan agreement has been delegated to the Registrar of Moneylenders via reg 11 of the Moneylenders (Control and Licensing) Regulations 2003 which provides that:

Notwithstanding regulation 10, where the registrar is satisfied that owing to special circumstances or hardships or necessary compliance with any of the provisions in the moneylending agreement is impracticable or unnecessary he may, by a letter in writing waive, modify, change, alter, vary, add or omit such provisions.

Whether there is a breach of s 17A of the Act

[25] The above provision states:

17A(1) For the purposes of this Act, *the interest for a secured loan shall not exceed twelve per centum per annum* and the interest for an unsecured loan shall not exceed eighteen per centum per annum.

(2) Notwithstanding subsection (1), interest shall not at any time be recoverable by a licensee of an amount in excess of the sum then due as principal unless a Court, having regard to all the circumstances, otherwise decrees.

(3) *Where in a moneylending agreement the interest charged for a secured loan or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable*.

(4) Any licensee who contravenes this section shall be guilty of an offence under this Act and shall be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding eighteen months or to both.

[26] The defendant submitted there is a limit of 12% as interest for the loan as the provision above says but the plaintiff's loan provides for charging of interest of more than 12%. The defendant submitted therefore the plaintiff had infringed this provision.

[27] First as can be seen that provision is only for secured loan. But the defendant had argued as stated earlier that the defendant can only provide for unsecured loan. Therefore the defendant has not been consistent in its

arguments. If the defendant wants to maintain the position that the plaintiff can only give unsecured loan, then obviously it is irrelevant for the defendant to raise this statutory provision.

[28] However assuming the above statutory provision is still relevant to be highlighted, it is first the finding of this court that the defendant had failed to give any proof indicating that the plaintiff had imposed or charged interest rate exceeding 12%pa.

[29] In this regard the case of *Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries Bhd* [1989] 3 MLJ 246 is relevant where it is said:

> The defendants contended that the interest claimed by the plaintiffs calculated to 31 December 1987 is without basis (see para 18 of the affidavit of Ricky Kho Teck Hock at encl 14). Paragraph 18 of the affidavit of Ricky Kho does not condescend into particulars as to how or why the interest claim is without any basis and it contains no more than a bare denial.

[30] It is a fact that the interest rate imposed by the plaintiff is 5.4% above Maybank's base lending rate. However, cl 6.02 of the loan agreement provides that the interest imposed by the plaintiff shall be calculated in accordance to the provisions of the Act. If there is any change in respect of the base lending rate, the maximum interest chargeable by the plaintiff is 12%pa.

[31] It is therefore not true to say that the plaintiff had imposed interest of more than 12%.

Whether there is a breach of s 17 of the Act

[32] The above statutory provision states:

> (1) Any moneylending agreement made on or after the commencement of this Act, for the loan of money by a licensee *shall be illegal in so far as it provides, directly or indirectly, for the payment of compound interest* or for the rate or amount of interest to be increased by reason of any default in the payment of sums due under the moneylending agreement:
>
> > Provided that provision may be made in any such moneylending agreement that if default is made in the payment upon the due date of any sum or instalment payable to the licensee under the moneylending agreement, whether in respect of principal or interest, *the licensee shall be entitled to charge simple interest on the unpaid sum or instalment which shall be calculated at the rate of eight per centum per annum from day to day from the date of default in payment of the sum or instalment until that sum or instalment is paid,* and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan. (Emphasis added.)

[33] The defendant submitted the above provision does not allow for compound and default interest and the plaintiff's loan had infringed this provision.

[34] In respect of this contention it is the finding of this court that the defendant did not produce any evidence or proof in the defendant's affidavit in reply to support its contention that the plaintiff had imposed compound interest.

[35] In any event the proviso to s 17(1) of the Act as highlighted provides for the imposition of late payment interest.

[36] It is important to appreciate that the defendant did not produce any evidence in the defendant's affidavit in reply to support its assertion that the plaintiff had imposed compound interest. There were no particulars shown by the defendant regarding the allegation about the imposition of compound interest. In this regard another case pertaining to money lending transaction which is relevant is the case of *Multi-Purpose Credit Sdn Bhd v Tan Sri Dato' Paduka (Dr) Ting Pek Khing* [2006] 5 MLJ 589; [2006] 6 CLJ 205 where it is said:

> The defendant's affidavits failed to 'condescend upon particulars' (per Lord Blackburn in *Wallingford v Mutual Society* [1874-80] All ER Rep Ext 1386 at p 1395; [1880] 5 App Cas 685 at p 704, HL). Since the defendant has failed to produce any evidence to support his assertions, the defendant must be deemed to have not 'condescend upon particulars' and this meant that those averments must be construed as mere bare denials and they should be rightly disregarded.

Whether the plaintiff had infringed reg 10(1) of the Moneylenders (Control & Licensing) Regulations 2003

> *Moneylending agreement*
>
> (1) Every agreement for moneylending transaction without security shall be in the form prescribed in Schedule J and where the agreement for moneylending transaction with security shall be in the form prescribed in Schedule K and any moneylender who executes moneylending agreement other than any of the Schedules commits an offence under the Act and shall on conviction be liable to the fine and imprisonment specified under subsection 10P(2) of the Act.

[37] The defendant submitted the above provision requires that the terms and conditions of moneylending agreement have to comply with specific terms as per Schedule J (for unsecured loans), and Schedule K (for secured loans). The word 'shall' in the said provision show that such compliance is mandatory failing which the agreement is deemed void and unenforceable.

[38] The defendant submitted that from the comparison between the terms in Schedule K and the loan agreement entered between the plaintiff and the defendant, it is clear that the plaintiff has departed from the mandatory provisions of Schedule K wherein the said agreement is similar to those issued by banks with vide powers to vary the chargeable interest and to include compound interest.

[39] The defendant in this regard contended that such provision within the agreement grants the plaintiff wide discretion to vary the mode as well as the basis of interest calculation which is wide enough to include the imposition of compound interest.

[40] With regard to the above the defendant's submission, as earlier stated it is clear from the evidence adduced by the plaintiff that the plaintiff had obtained the approval from the Registrar of Moneylenders to modify and vary the terms of the prescribed agreement in Schedule K.

[41] Hence it is incorrect for the defendant to say that the plaintiff departure from the mandatory provisions of Schedule K is wrong as the latter indeed is allowed not to strictly follow what is essentially in that schedule.

Whether the plaintiff's breached s 27(1), (2) and (3) of the Act

[42] The above provisions state:

(1) A moneylending agreement *shall be attested by an Advocate and Solicitor of the High Court*, an officer of the Judicial and Legal Service, a Commissioner for Oaths, District Officer, Justice of the Peace or such other person as may be appointed by the Minister generally for such purpose.

(2) *The attestor shall explain the terms of the moneylending agreement to the borrower, and shall certify on the agreement that the borrower appears to understand the meaning of the terms of the agreement.*

(3) *Any moneylending agreement which is not attested in accordance with this section shall be void and have no effect and shall not be enforced.* (Emphasis added.)

[43] In respect of the above provisions, the defendant contended the moneylending instrument was not executed before the appropriate person and the terms were not explained to them.

[44] With regard to this contention of the defendant, there is evidence from the solicitor himself, one Yew Siew Wai who gave sworn affidavit stating that he

went to the defendant's office to witness the defendant signing the loan agreement and he had explained the terms of the same.

[45] With such evidence coming from the solicitor himself, there is no reason to say that the above statutory provisions were not complied by the plaintiff. It is evident that the defendant is clutching on straws in respect of this submission.

Whether the plaintiff's demand to foreclose is defective

[46] The defendant contended that the plaintiff's demand for the outstanding amount to be paid within seven days of the issuance of Form 16D of the NLC is wrong. This is because according to the mandatory terms of Schedule K, the period within which the defendant has to remedy the default is a period of twenty eight days. As such the defendant contended the plaintiff's non-compliance of the mandatory terms within Schedule K has caused the defective issuance of the demand for foreclosure.

[47] On this contention of the defendant, this court has already explained, the plaintiff had obtained the consent of the Registrar of Moneylending to depart from Schedule K. The plaintiff had been given the approval to modify and vary the terms of the prescribed agreement in Schedule K. Hence there is no reason to rule that what is stated in that schedule must be strictly complied by the plaintiff.

Whether the plaintiff's breached s 18 of the Act

[48] The above provision states:

> (1) Every licensee shall keep or cause to be kept and maintained —
>
> (a) such original copy of the money lending agreement for each loan in which he is or has been concerned; and
>
> (b) such regular accounts of each loan made clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages, for a period of not less than seven years from the end of the year in which the loan is made.
>
> (2) If any licensee subject to the obligations of this section fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which default shall have been made. He shall also be guilty of an offence under this Act and shall be liable to a fine not exceeding ten thousand ringgit, or in the case of a

A

> continuing offence, to a fine not exceeding one thousand ringgit for each day or part of a day during which such offence continues.

[49] The defendant contended the above provisions were not complied by the plaintiff in respect of the loan.

B

[50] This court is of the view that the burden is on the defendant to prove that the plaintiff has not kept the account regularly as provided under s 18(1)(b) of the Act. The defendant had failed to discharge this burden and this contention is not supported by evidence. Instead it is the finding of this court that the plaintiff was able to provide for the particulars stated in the statement of account at p 225 of the affidavit in support because the same had kept and maintained the record. There is no evidence coming from the defendant that the particulars provided in the statement of account are inaccurate.

C

D

[51] In any event, s 18 of the Act does not require the plaintiff to produce physical account when making a claim against the defendant. What is required to be produced by the plaintiff is the statement of account as provided under s 19 of the Act, s 21 of the Act and First Schedule A of the Act whereby the plaintiff is required only to provide the particulars as to the principal amount, amount or interest rate, repayment and amount of arrears and sums not yet due.

E

F

Whether the plaintiff's breached s 23 of the Act

[52] The above provision states:

> Any moneylending agreement between a licensee and a borrower or intending borrower for the payment by the borrower or intending borrower to the licensee of any sum on account of costs, charges or expenses other than stamp duties, fees payable by law and legal costs incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a licensee by a borrower or intending borrower as, for or on account of any such costs, charges or expenses other than as aforesaid that sum shall be recoverable as a debt due to the borrower or intending borrower, or in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly.

G

H

[53] The defendant contended in respect of the above provision that the plaintiff had imposed on solicitor-client basis legal costs in the loan agreement and expenses on the loan which are prohibited by the above provision.

I

[54] On this, it must be noted that as explained earlier the plaintiff had obtained the permission of the Registrar of Moneylending to depart from

Schedule K although this schedule does not mention imposition of charges and expenses and legal fees on solicitor-client basis. Therefore the above provision cannot apply against the plaintiff.

Whether s 66 of the Contracts Act 1950 operates in favour of the defendant

[55] The above provision states:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[56] The defendant argued that the above provision applies in its favour as the loan agreement is void.

[57] However as explained, the various contentions of the defendant that the loan agreement is void could not be accepted by this court largely as the same has not been proven to contravene various provisions of the Act as submitted by the defendant. This provision can only apply for the defendant if the loan agreement is found to infringe the provisions of the Act.

Whether s 71 of the Contracts Act 1950 operates in favour of the defendant

[58] The above provision states:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[59] There could not be any dispute that it is almost preposterous to suggest that the above provision should apply for the defendant. Having been given the loan and executing the loan agreement, there is nothing gratuitous about the same either for the plaintiff or the defendant. Both parties are tied and expected to honour the terms of the loan agreement. The above provision is irrelevant to the facts of this case now. In fact if it is applicable, it should be for the benefit of the plaintiff.

CONCLUSION

[60] As explained, the challenge against the OS by the defendant largely is premised on the breaches of the Act, which in turn allegedly affects the loan agreement. However as shown by the case law this cannot displace the right of the plaintiff for the action in rem in relation to order of sale pursuant to s 256(3) of the NLC.

[61] Nonetheless as elaborated too, the alleged non-compliance by the plaintiff with respect to the provisions of the Act has not been proven by the defendant.

[62] Accordingly the plaintiff's OS is allowed with costs against the defendant.

Plaintiff's OS allowed with costs.

Reported by Dzulqarnain Ab Fatar